

FCC MAIL SECTION

Federal Communications Commission

DA 99-2685

DEC 7 2 21 PM '99

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 99-343
Table of Allotments,)	RM-9750
FM Broadcast Stations.)	
(Elberton and Lavonia, Georgia])	
)	
In re Application of)	
)	
Waves of Mercy Productions, Inc.)	BPED-19990630MB
Pendergrass, Georgia)	
)	
For Construction Permit for New)	
Noncommercial Educational FM Station)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 24, 1999

Released: December 3, 1999

Comment Date: January 24, 2000

Reply Comment Date: February 8, 2000

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Radio Elberton, Inc. ("petitioner"), proposing the reallocation of Channel 221A from Elberton, Georgia, to Lavonia, Georgia, as the community's first local aural service, and the modification of Station WWRK-FM's license accordingly. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner filed its request pursuant to Section 1.420(i) or the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, petitioner states that Lavonia is an incorporated community with a population of 1,840 persons and has businesses, churches, clubs and other characteristics of communities that already have radio allotments. Elberton, with a population of 5,682 people, presently receives local aural service from two FM stations, WWRK-FM and WEHR, Channel 286A, as well as AM Station WSGC. Therefore, petitioner states that the allotment of Channel 221A to Lavonia would fulfill the highest allotment priority since there is virtually no

populated area without any reception service.¹

3. Petitioner states that the reallocation will also enable Station WWRK-FM to operate as a 6 kW Class A station instead of its present 3 kW limitation. Thus, it submits that the reallocation of Channel 221A from Elberton to Lavonia will enable Station WWRK-FM to provide service to 60,810 persons within a 2,511 square mile area, an increase of 183 percent from its present 21,488 persons within a 1,732 square mile area. According to the petitioner, all of the people within the station's reception area will lose service because there is no overlap of the present and proposed 60 dBu contours. However, it states that the entire loss area will continue to be well-served by five or more aural services. Finally, petitioner states that Lavonia is not located within any Urbanized Area.

4. We believe petitioner's proposal warrants consideration since the allotment of Channel 221A to Lavonia could provide the community with its first local aural service without depriving Elberton of its sole such service since it will continue to receive service from Stations WEHR and WSGC. Further, we have confirmed that Lavonia is not within an Urbanized Area and its proposed 70 dBu contour will not encompass any portion of an Urbanized Area. A staff engineering analysis has determined that Channel 221A can be allotted to Lavonia in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.5 kilometers (7.8 miles) west to accommodate petitioner's desired transmitter site.² We recognize that this allotment conflicts with the earlier-filed application of Waves of Mercy Productions, Inc. (Waves of Mercy), for noncommercial educational Channel 220A at Pendergrass, Georgia (BPED-19990630MB).³ Pendergrass and Lavonia are approximately 46 kilometers apart while the Commission's Rules specify a minimum separation of 72 kilometers for first-adjacent Class A channels. However, the application had not been placed on the cut-off Public Notice at the time the petition was filed. Therefore, in accordance with the provisions set forth in Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, we seek comments on the timely filed application and petition.⁴ In this regard, commenting parties should be guided by the allotment priorities set forth in Revision of FM Assignment Policies and Procedures, *supra*. See also, Sacred Heart University, Inc., et al, 7 FCC Rcd 3466 at 3470 (1992) (the same allotment priorities apply for both commercial and noncommercial

¹ The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local aural service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

² The coordinates for Channel 221A at Lavonia are 34-27-26 North Latitude and 83-14-27 West Longitude.

³ The coordinates specified in the Waves of Mercy application for Channel 220A at Pendergrass are 34-12-59 North Latitude and 83-38-50 West Longitude.

⁴ See, 7 FCC Rcd 4917, fn. 1 (1992). Applications for new stations in the reserved FM band will be protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices.

channels).

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Elberton, Georgia	221A, 286A	286A
Lavonia, Georgia	--	221A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. IT IS ORDERED, That the Secretary SHALL SEND, a copy of this Notice of Proposed Rule Making BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, to the Pendergrass applicant, as follows: Waves of Mercy Productions, Inc., 5319 Amherst Way, Flowery Branch, GA 30542

8. Interested parties may file comments on or before January 24, 2000, and reply comments on or before February 8, 2000, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, and the applicant, as follows:

John M. Pelkey
Haley Bader & Potts P.L.C.
4350 North Fairfax Drive, Suite 900
Arlington, VA 22203-1633
(Counsel to petitioner)

Waves of Mercy Productions, Inc.
5319 Amherst Way
Flowery Branch, GA 30542
(Applicant for Pendergrass, GA)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of

the Commission's Rules, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs,

or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.